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THE CONSTITUTION IN THE SUPREME COURT: THE PREFERRED-POSITION DEBATE, 1941-1946

David P. Currie*

While the Supreme Court grappled with questions arising out of the Second World War,¹ ordinary life went on. In a large number of decisions more remote from the emotions and uncertainties of war, the Court cemented the gains of the New Deal revolution and made further progress in defining the contours of civil rights and liberties that it had begun to draw under the leadership of Chief Justice Hughes.²

In addressing the familiar economic issues that had dominated the docket before that revolution,³ the Justices largely confirmed the Washington Post's sunny prediction that " 'for years to come there would be virtual unanimity on the tribunal.' " ⁴ None of the Brethren objected when, in *Wickard v. Filburn*,⁵ a congressional limitation of the wheat a farmer could plant for his own use was upheld under the commerce clause, even though the transaction was neither interstate nor commerce.⁶ None complained when in

* Harry N. Wyatt Professor of Law, University of Chicago. The author wishes to thank the Catholic University Law School, where this paper and that next cited formed the basis of the Pope John XXIII Lecture in April of 1987, and Geoffrey R. Stone for helpful criticism.

1. See Currie, *The Constitution in the Supreme Court: The Second World War, 1941-1946*, 37 CATH. U.L. REV. 1 (1987) [hereinafter Stone I].

2. See Currie, *The Constitution in the Supreme Court: Civil Rights and Liberties, 1930-1941*, 1987 DUKE L.J. (forthcoming) [hereinafter Hughes II].

3. See Currie, *The Constitution in the Supreme Court: The New Deal, 1930-1941*, 54 U. CHI. L. REV. 504 (1987) [hereinafter Hughes I].

4. G. DUNNE, *HUGO BLACK AND THE JUDICIAL REVOLUTION* 204 (1977) (citation to original source not provided).

5. 317 U.S. 111 (1942).

6. "[I]f we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." *Id.* at 128 (Jackson, J., for a unanimous Court); see also *A.B. Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942) (Frankfurter, J., over a dissent by Roberts, J.) (holding Fair Labor Standards Act's wage and hour regulations applied, i.e., to elevator operators in building whose tenants manufactured goods for interstate shipment); Dodd, *The Supreme Court and Fair Labor Standards, 1941-1945*, 59 HARV. L. REV. 321, 324-34 (1946); Stern, *The Commerce Clause and the National Economy, 1933-1946* (pt. 2), 59 HARV. L. REV. 883, 901-09 (1946) (applauding the decision).

The Court also unanimously held that Congress could regulate insurance despite three-quarters of a century of unpersuasive precedent that it was not commerce even if interstate.

Carolene Products Co. v. United States,⁷ the second *Carolene Products* decision, due process objections to a ban on interstate transportation of "filled" milk, after the addition of vitamins had eliminated any legitimate health concern, were rejected on the ground that it was "disputable" whether mere regulation could remove the danger of confusing it with "the natural product." The methods employed in the exercise of congressional powers, wrote Justice Reed in the latter case, "are beyond attack without a clear and convincing showing that there is no rational basis for the legislation."⁸

However, in the first *Carolene Products* decision, *United States v. Carolene Products Co.*,⁹ Justice Stone had suggested that the Court might more strictly scrutinize measures falling "within a specific prohibition . . . such as those of the first ten amendments," or "restrict[ing] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or directed against "discrete and insular minorities." The civil rights and civil liberties decisions of the 1930's seemed to bear out this suggestion.¹⁰ In grappling with cases in Stone's preferred categories, however, great differences of opinion developed among Justices who had been unani-

See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868), discussed in D. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* 352 (1985). In a companion case, four Justices insisted, however, that Congress could do so only because insurance affected interstate commerce, thereby avoiding a disruption of established schemes of state regulation. See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552-53 (1944) (Black, J., writing for four of the seven participating Justices) (holding Sherman Act applied to insurance). But see *id.* at 562-83 (Stone, C.J., dissenting); *id.* at 583-84 (Frankfurter, J., dissenting); *id.* at 584-95 (Jackson, J., dissenting); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944) (Frankfurter, J.) (applying the theory of the *South-Eastern* dissenters to uphold application of the National Labor Relations Act to an insurer); Powell, *Insurance As Commerce in Constitution and Statute*, 57 HARV. L. REV. 937 (1944) (agreeing with the dissenters in *South-Eastern*).

When Congress in the McCarran Act intervened to restore any state authority taken away by the *South-Eastern* decision, the Court predictably upheld the statute, see *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946) (Rutledge, J., noting that to hold otherwise "would invert the constitutional grant into a limitation upon the very power it confers"), as it had upheld similar statutes removing commerce clause barriers to state regulation since the 1890's, see, e.g., Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. CHI. L. REV. 324, 361-62 (1985) [hereinafter Fuller I] (discussing *In re Rahrer*, 140 U.S. 545 (1891)), despite indefensible contrary decisions respecting the analogous limitation found implicit in article III's grant of admiralty jurisdiction, see, e.g., *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), discussed in Currie, *The Constitution in the Supreme Court: 1910-1921*, 1985 DUKE L.J. 1111, 1144 [hereinafter White].

7. 323 U.S. 18, 21-22, 28-29 (1944).

8. *Id.* at 31-32. Justices Black and Douglas concurred only in the result, presumably because they thought economic due process should have been disowned altogether. *Id.* at 32. See *Olsen v. Nebraska*, 313 U.S. 236 (1941) (Douglas, J., enunciating an even more hands-off approach).

9. 304 U.S. 144, 152 n.4 (1938), discussed in Hughes I, *supra* note 3, at 546.

10. See Hughes II, *supra* note 2, *passim*.

mous in upholding ordinary economic legislation.¹¹

I. THE OPENING OF THE RIFT

A. *Obstructing Justice*

Soon after Stone became Chief Justice, differences of opinion among the Justices erupted in *Bridges v. California*,¹² where the Court split five to four over the constitutionality of contempt convictions for statements allegedly interfering with the administration of justice in pending cases. Justice Black wrote for the majority to set aside the convictions on freedom of expression grounds.¹³ Justice Frankfurter, joined by Chief Justice Stone and Justices Roberts and Byrnes, wrote for the dissenters.¹⁴ It was a battle of giants and a preview of things to come.

In part, the difference between the opinions of Black and Frankfurter lay in their varying assessments of the facts. The President of the International Longshoremen's and Warehousemen's Union had published a telegram warning of a crippling strike if a court order was enforced. The Los Angeles Times had published an editorial urging a judge not to place named offenders on probation.¹⁵ To Frankfurter, both publications were "attempt[s] to overawe a judge in a matter immediately pending before him."¹⁶ To Black they were essentially harmless since the Times editorial "did no more than threaten future adverse criticism which was reasonably to be expected anyway in the event of a lenient disposition of the pending case" and Bridges' telegram had told the judge nothing he could not be assumed to have known before.¹⁷

Yet the differences between the majority and dissenting Justices ran deeper. They quarreled, to begin with, over the weight to be given to history in interpreting the speech and press guarantees. Justice Frankfurter insisted

11. For statistical demonstration of this fractiousness, see C. PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947* (1948).

12. 314 U.S. 252, 258-59 (1941).

13. *Id.* at 258-78.

14. *Id.* at 279-305 (Frankfurter, J., dissenting).

15. *Id.* at 298-302 (Frankfurter, J., dissenting).

16. *Id.* at 279 (Frankfurter, J., dissenting). Frankfurter noted: "A powerful newspaper brought its full coercive power to bear [on a judge, whose continuance in office was dependent upon securing popular approval within a year], in demanding a particular sentence." *Id.* at 300 (Frankfurter, J., dissenting). He continued that it would be "inadmissible dogmatism" to say that publication of the telegram (which the state supreme court regarded "as 'a threat that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up'") could not have "dominated the mind" of the state court judge. *Id.* at 302 (Frankfurter, J., dissenting) (citation omitted).

17. *Id.* at 273, 278.

that "the power to punish for contempt for intrusions into the living process of adjudication ha[d] been an unquestioned characteristic of English courts and of the courts of this country" for over 200 years;¹⁸ Black retorted that the first amendment had been adopted in order to disavow "oppressive English restrictions" and that "untested state decisions" were not determinative.¹⁹

The Justices also differed as to the substantive standard by which the state's action was to be judged. Noting that the contempt citations in *Bridges* rested not upon a legislative determination entitled to deference under *Gitlow v. New York*,²⁰ but on the common law, Justice Black took the occasion to enshrine the famous "clear and present danger" test, which had begun to crop up again in the late 1930's, in its most protective form: "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."²¹ Justice Frankfurter, who thought it enough, as the state court had held, that the publications had a "reasonable tendency to interfere with the orderly administration of justice," commented that "[t]he phrase 'clear and present danger' is merely a justification for curbing utterance where that is warranted by the substantive evil to be prevented . . . and the literary difference between it and 'reasonable tendency' is not of constitutional dimension."²²

The majority and the dissenters also differed in the relative importance they accorded to the competing values of free speech and fair trial. Justice Black emphasized that punishment of the utterances in question would preclude discussion of matters of great public importance at a crucial time,²³

18. *Id.* at 285 (Frankfurter, J., dissenting); see also *id.* at 290 (Frankfurter, J., dissenting) (invoking Justice Holmes' decision upholding a similar conviction in *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)), discussed in Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1890-1910*, 52 U. CHI. L. REV. 867, 871-72 (1985) [hereinafter Fuller II].

19. 314 U.S. at 265, 268 & n.13 (dismissing *Patterson v. Colorado*, 205 U.S. 454 (1907), on the ground—which Holmes had refused to take—that the Court had not yet held first amendment limitations applicable to the states); see *Patterson*, 205 U.S. at 462 (expressly assuming that state was forbidden to abridge freedom of expression).

20. 268 U.S. 652 (1925), discussed in Currie, *The Constitution in the Supreme Court: 1921-1930*, 1986 DUKE L.J. 65, 82-88 [hereinafter Taft].

21. *Bridges*, 314 U.S. at 260-63. For the earlier career of this standard, see White, *supra* note 6, at 1145-55; Hughes II, *supra* note 2; Taft, *supra* note 20, at 82-91.

22. *Bridges*, 314 U.S. at 295-96 (Frankfurter, J., dissenting). Holmes had said much the same thing in *Patterson*: "If a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it . . ." 205 U.S. at 463; see also Hanson, *The Supreme Court on Freedom of the Press and Contempt by Publication*, 27 CORNELL L.Q. 165 (1942) (highlighting this disagreement and applauding Justice Black).

23. *Bridges*, 314 U.S. at 268.

while Justice Frankfurter noted that “[the] administration of justice by an impartial judiciary” was “basic to our conception of freedom.”²⁴ Finally, while there was no hint of either judicial restraint or federalism in Justice Black’s opinion, Justice Frankfurter invoked both “the presumption of validity” and the “duty to give due regard . . . to the state’s power to deal with what may be essentially local situations.”²⁵ In short, some of the New Deal Justices seemed much more willing than others to set aside measures affecting freedom of expression, and among the more reluctant in *Bridges* was Chief Justice Stone.²⁶

B. Picketing

In a final burst of unanimity that closed the Hughes era, Justice Murphy’s maiden opinion in *Thornhill v. Alabama*,²⁷ assimilating freedom of speech to *Carolene Products*’ preferred category of devices for the democratic correction of error, had struck down as overbroad a state statute read essentially to forbid all labor picketing.²⁸ Less than one year later, however, that unanimity had vanished as Justices Black, Douglas, and Reed dissented in *Milk*

24. *Id.* at 268-69, 282 (Frankfurter, J., dissenting).

25. *Id.* at 293 (Frankfurter, J., dissenting). Justice Frankfurter added: “We must be fastidiously careful not to make our private views the measure of constitutional authority.” *Id.* (Frankfurter, J., dissenting).

26. *Bridges* also presented interesting technical problems to which Justice Black did not advert, though the dissenters prominently called attention to some of them. *See id.* at 280 (Frankfurter, J., dissenting) (protesting that “[w]e are not even vouchsafed reference to the specific provision of the Constitution” on which the majority relied). *Bridges* was an alien and the owner of the *Times* was a corporation; neither was a “citizen” protected by the privileges or immunities clause, which Justice Black was later to suggest made the first amendment applicable to the states. *See Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting). Earlier decisions had placed freedom of expression within the due process clause. *See Hughes II, supra* note 2. However, as Justice Frankfurter argued, without adverting to *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (a case in which the Court had ignored the problem in striking down a tax restricting the press freedom of corporations), there was authority to the effect that corporations—which Black had once iconoclastically denied were “persons” for due process purposes, *see Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 85-90 (1938) (Black, J., dissenting)—had no “liberty” within the meaning of that clause. Finally, the actions complained of in *Bridges* were those of judges rather than legislators; if the theory was that the fourteenth amendment made the first amendment applicable to the states, it should have been food for thought that the latter (“Congress shall make no law”) seemed to limit only legislative action.

27. 310 U.S. 88 (1940).

28. *Id.* at 95-96 (“Mere legislative preference for one rather than another means for combating substantive evils . . . may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions.”), *discussed in Hughes II, supra* note 2; *see also AFL v. Swing*, 312 U.S. 321, 326 (1941) (Frankfurter, J., over two dissents arguing only that the issue was not properly presented) (holding without much explanation that the state could not ban all organizational picketing: “The right of free communication cannot . . .

Wagon Drivers Union v. Meadowmoor Dairies, Inc.,²⁹ a decision that upheld an injunction against peaceful picketing that Justice Frankfurter said could justifiably be found coercive because of "the momentum of fear generated by past violence."³⁰ As in *Bridges*, the disagreement in *Milk Wagon* turned in part upon differing assessments of the facts.³¹ Furthermore, Justice Frankfurter once again emphasized deference to the state courts while Justice Black continued to insist on the need to find a "clear and present danger" of harm.³² Justice Reed, moreover, went further by noting that "[i]f the fear engendered by past misconduct coerces storekeepers during peaceful picketing, the remedy lies in the maintenance of order, not in denial of free speech."³³

This basic disagreement between the Justices flared up again in two picketing cases decided soon after Stone became Chief Justice. In the first, *Carpenters & Joiners Union v. Ritter's Cafe*,³⁴ the Court, in another Frankfurter opinion, upheld an injunction against picketing a restaurant in violation of a state antitrust law over dissents by Justices Black, Douglas, Murphy, and Reed. The picketers' only quarrel with the restaurant owner was that he had hired a contractor who employed nonunion labor to construct another building less than two miles away. To hold this picketing constitutionally protected, wrote Frankfurter, "would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose."³⁵

However, in the second case, *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*,³⁶ which was decided the same day as *Ritter's Cafe*, the Court unanimously set aside an injunction against the picketing of bakeries because of a

be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."').

29. 312 U.S. 287 (1941).

30. *Id.* at 293, 294 (adding that "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force").

31. *See id.* at 313-16 (Black, J., joined by Douglas, J., dissenting) ("[I]t is going a long way to say that because of the acts of these few men, six thousand other members of their union can be denied the right to express their opinion . . ."); *cf. id.* at 294-95 (Frankfurter, J.) (terming the acts of violence "neither episodic nor isolated," quoting the state court's conclusion that "in connection with or following a series of assaults or destruction of property, [picketing] could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred," and adding that "[w]e can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee." (citation omitted)).

32. *See id.* at 313 (Black, J., dissenting).

33. *Id.* at 319 (Reed, J., dissenting).

34. 315 U.S. 722 (1942).

35. *Id.* at 728.

36. 315 U.S. 769, 775 (1942).

dispute with "independent jobbers" who purchased their products, delivered them to retailers in their own trucks, and resold them. Effectively distinguishing *Ritter's Cafe* without referring to it, Justice Jackson explained that the jobbers' "mobility and their insulation from the public as middlemen made it practically impossible for [the union] to make known [its] legitimate grievances to the public whose patronage was sustaining the peddler system" without picketing the bakers, and that the picketing was "such as to have slight, if any, repercussions upon the interests of strangers to the issue."³⁷

The reference to the impact upon "strangers" seemed to suggest that the bakers, unlike the owner of *Ritter's Cafe*, were not "neutrals" at all since the "independent jobbers" were their former deliverymen. In a real sense the dispute was over the bakers' own decision to stop employing union labor.³⁸ The argument respecting the drivers' mobility, however, was more fundamental. *Thornhill* had established that picketing was an indispensable means for bringing "the facts of a labor dispute" to the attention of the public; the risk that it might "persuade some of those reached to refrain from entering into advantageous relationships with the business establishment which is the scene of the dispute" did not justify forbidding it altogether.³⁹ Similarly, when the mobility of those with whom the picketers dispute makes it impracticable to convey the message by picketing them directly, as in *Wohl*, even "repercussions upon the interests of strangers" may have to be accepted if the message is to be effectively conveyed.⁴⁰ The state had a legitimate interest, however, in protecting innocent persons from group boycotts designed to force them to take sides in other people's disputes. Furthermore, the state was entitled to effectuate this interest so long as it left the parties, as in *Ritter's Cafe*, a reasonable opportunity to get their information across at the site of the actual dispute.

Thus, there was a strong argument that, unlike the blanket prohibition on

37. *Id.* at 775. Justice Douglas, joined by Justices Black and Murphy, added a separate concurring opinion. *Id.* at 775-77 (Douglas, J., concurring).

38. See *id.* at 770-71 (showing that drivers had been made "independent" to reduce social security and unemployment-insurance costs); cf. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 132 (1944) (holding "independent" newsboys newspaper "employees" within National Labor Relations Act).

39. See *Thornhill*, 310 U.S. 88, 102, 104 (1940) ("The safeguarding of these means is essential to the securing of an informed and educated public opinion . . ."); cf. *Schneider v. State*, 308 U.S. 147, 162 (1939) (holding risk of littering did not justify total ban on distribution of hand bills on sidewalks and streets), discussed in *Hughes II*, *supra* note 2.

40. Thus, for example, picketing the site of the new building in *Ritter's Cafe* might well have been constitutionally protected, although it too might have had some tendency to "conscript neutrals," because that was the most logical place to publicize a dispute with the building contractor. Picketing at the building site, Justice Frankfurter noted, had not been enjoined. *Ritter's Cafe*, 315 U.S. at 724.

picketing in *Thornhill*, the injunction upheld in *Ritter's Cafe* was a reasonable regulation of the place and manner of communicating information.⁴¹ Moreover, the fact that the picketers chose to convey their message at the premises of a person with whom they had no direct dispute strongly suggests that their purpose was in large part to persuade others not to do business with him. If the state can forbid a concerted refusal to deal under these circumstances, it should be able to forbid speech inciting to the commission of the offense—by picketing or otherwise.⁴² The decision underlined the growing split on matters of free expression between Justices Frankfurter, Roberts, Byrnes, and Stone on one side and Justices Black, Douglas, Murphy, and Reed on the other, with Justice Jackson holding the balance of power between them.

II. JEHOVAH'S WITNESSES—AGAIN

In the 1930's, Jehovah's Witnesses had won significant first amendment victories, from freedom from overbroad or discretionary permit requirements to the right to distribute handbills and protection against abusive enforcement of laws against breaches of the peace.⁴³ At the end of the Hughes period, however, the Witnesses had been rebuffed in seeking special exemption from a generally applicable flag salute requirement and in attacking a

41. Congress soon wrote similar distinctions into § 8(b) of the Taft-Hartley Act, Pub. L. No. 86-257, 73 Stat. 519 (codified at 29 U.S.C. § 158(b)(4), (7) (1982)). *Ritter's Cafe* may indeed have been easier to defend than the limitations in Taft-Hartley, which forbade picketing only by labor organizations and only for certain goals, since it was based upon a general anti-trust statute that seemed neutrally to forbid *all* speakers to induce third parties to take sides in other people's disputes.

42. See *Hughes v. Superior Court*, 339 U.S. 460, 469 (1950) (Frankfurter, J., without dissent) (upholding injunction against picketing to induce unlawful racial discrimination in hiring); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (Black, J., writing for a unanimous Court) (upholding injunction against picketing to induce wholesaler to join illegal group boycott of nonunion ice peddlers: "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."); *Frohwerk v. United States*, 249 U.S. 204, 206 (1919) ("We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."); Dodd, *Picketing and Free Speech: A Dissent*, 56 HARV. L. REV. 513, 524 (1943). It is noteworthy that the remedy in all the picketing cases was an injunction, which the Court in *Near v. Minnesota*, 283 U.S. 697 (1931), had condemned as a prior restraint even when the expression enjoined was constitutionally punishable. See *Hughes II*, *supra* note 2. Nobody explained why illegal picketing should be an exception to this rule. See *Teller, Picketing and Free Speech*, 56 HARV. L. REV. 180, 195-200 (1942) (arguing that *Ritter* and *Wohl* substantially weakened *Thornhill's* equation of picketing with speech).

43. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939); *Hughes II*, *supra* note 2 (discussing *Lovell v. Griffin*, 303 U.S. 444 (1938)).

parade permit provision carefully limited to traffic control purposes.⁴⁴ Continued reversals during the early days of Chief Justice Stone came to an abrupt halt after Justice Rutledge replaced Justice Byrnes in 1943.

A. *Fighting Words*

In *Chaplinsky v. New Hampshire*,⁴⁵ none of the Justices had any difficulty in concluding that a state could punish a Jehovah's Witness or anyone else for calling a city marshal a " 'God damned racketeer' and 'a damned Fascist.' " It was the libertarian Justice Murphy who wrote to emphasize that "the right of free speech [wa]s not absolute" and that "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"—were among "certain well-defined and narrowly limited classes of speech" that were not protected—both for historical reasons and because of their "slight social value" when compared with "the social interest in order and morality."⁴⁶

While Justice Black rejected history in *Bridges*, Justice Murphy embraced it in *Chaplinsky*. Posterity was to have difficulty with Murphy's gratuitous assimilation of "the lewd and obscene, the profane, [and] the libelous" to the unprotected categories,⁴⁷ as well as with the Court's contemporaneous and wholly conclusory holding that "commercial advertising" was not protected either.⁴⁸ Regardless of history, it is always troublesome in terms of first

44. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled*, *Board of Educ. v. Barnette*, 319 U.S. 625 (1943); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *see also* Hughes II, *supra* note 2.

45. 315 U.S. 568, 569-70 (1942) (quoting the complaint in *Chaplinsky*).

46. *Id.* at 571-72 (adding that the punishment of speech in such categories had "never been thought to raise any Constitutional problem"); *see also id.* at 574 ("The appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."). Justice Murphy's biographer, who carefully documented his increasing zeal for protection of civil liberties, termed the *Chaplinsky* opinion "early Murphy." *See* J. HOWARD, MR. JUSTICE MURPHY 256 (1968).

47. *Chaplinsky*, 315 U.S. at 572; *cf.* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (limiting the traditional cause of action for libel); *Roth v. United States*, 354 U.S. 476, 508-14 (1957) (Douglas & Black, JJ., dissenting from decision holding obscene publications punishable).

48. *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942) (Roberts, J.). This debatable decision had been foreshadowed by equally conclusory dictum in *Schneider v. State*, 308 U.S. 147, 165 (1939), *discussed in* Hughes II, *supra* note 2, and it derived support from repeated arguments that the purpose of the first amendment was to permit free discussion of political issues as an instrument of self-government. *See, e.g.,* *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring); A. MEIKELJOHN, *FREE SPEECH AND ITS RELATIONS TO SELF-GOVERNMENT* 15-16, 24-27, 39 (1948); *see also* *Chrestensen v. Valentine*, 122 F.2d 511, 524 (2d Cir. 1941) (Frank, J., dissenting), ("Such men as Thomas Paine, John Milton and Thomas Jefferson were not fighting for the right to peddle commercial advertising."), *rev'd*, 316 U.S. 52 (1942); Resnick, *Freedom of Speech and Commercial Solicitation*, 30

amendment policy to limit the content of speech.⁴⁹ A neutral ban on fighting words, in contrast, can be defended as a reasonable restriction of the *manner* of expression, since it leaves the speaker free to convey whatever message he likes in less inflammatory terms.⁵⁰

B. License Taxes

Two months after *Chaplinsky*, however, differences of opinion boiled up again when the Court, by a five to four vote in *Jones v. Opelika*,⁵¹ held that the Constitution granted Jehovah's Witnesses no exemption from taxes on the sale of religious literature. The lineup of Justices was the same as in the picketing case of *Ritter's Cafe*, with two interesting exceptions—this time it was Justice Reed who wrote to reject the constitutional claim, while Chief Justice Stone joined the predictable Justices Black, Douglas, and Murphy in dissent.⁵²

Discriminatory taxes on newspapers had been struck down in *Grosjean v. American Press Co.*⁵³ in 1936, but the taxes upheld in *Jones* applied impartially to purveyors of other goods as well.⁵⁴ In *Grosjean*, the Court made clear that it did not mean "to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for the support of the government."⁵⁵ A later decision would explain why: "We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency."⁵⁶

CAL. L. REV. 655, 661 (1942). But see *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 764 (1976) (holding certain advertisements protected: "[S]ociety also may have a strong interest in the free flow of commercial information.").

Determining what speech was "commercial," in any event, was to prove somewhat challenging. For example, while *Valentine* had held that an advertisement could not be brought under the constitutional umbrella simply by affixing to it a protest against the advertising ban itself, 316 U.S. at 55, *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (Black, J.), held that distribution of an invitation to a religious meeting could not be prohibited simply because it also invited the purchase of books. Not one Justice suggested that the two cases were indistinguishable.

49. See Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, *passim* (1983).

50. *Id.* at 242-44 (discussing the related issue of profanity); cf. *Hughes II*, *supra* note 2.

51. 316 U.S. 584 (1942).

52. See *id.* at 600-24.

53. 297 U.S. 233 (1936), discussed in *Hughes II*, *supra* note 2.

54. *Jones*, 316 U.S. at 586-92.

55. 297 U.S. at 250; cf. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-93 (1946) (Rutledge, J.) (holding the same for Fair Labor Standards Act); *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (Black, J.) (holding the same for antitrust law); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (holding press not immune from generally applicable labor laws).

56. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983).

Justice Reed thought this conclusion determinative in *Jones*: "The First Amendment does not require a subsidy in the form of fiscal exemption" for either religion or the press.⁵⁷

The Witnesses' setback was temporary, however, for within a year Justice Rutledge had replaced Justice Byrnes, voted with the *Jones* dissenters to grant a rehearing,⁵⁸ and joined Justice Douglas' opinion in *Murdock v. Pennsylvania*⁵⁹ for a new five to four majority reaching the opposite conclusion.⁶⁰ Echoing Stone's dissent in the earlier case, Douglas argued it was not enough that similar taxes had been laid upon commercial enterprises operated for profit—the Constitution had placed freedom of speech, press, and religion "in a preferred position."⁶¹

Decisions limiting the use of injunctions and permits that could have been employed against other activities did indeed suggest that speech and press, although not religion, were entitled to some special constitutional privileges.⁶² There were, moreover, strong arguments to support this distinction. The virtual representation assured by forbidding discrimination may well be sufficient to protect "discrete and insular minorities," which seems to have been the purpose of the free exercise clause. It may nevertheless be inadequate to assure the integrity of the political process, which Justice Stone had rightly suggested was one of the functions of free expression in *Carolene Products*.⁶³ Justice Murphy seemed to be going very far, however, in suggesting in a second *Jones* dissent that those exercising first amendment freedoms bore no responsibility whatever for helping to defray the common costs of government.⁶⁴ Justice Douglas, in *Murdock*, pulled back from this

57. 316 U.S. at 599.

58. *Jones v. Opelika*, 319 U.S. 103 (1943) (per curiam).

59. 319 U.S. 105 (1943).

60. See Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313, 320 (1952) ("The tenure of Mr. Justice Rutledge marks the era *par excellence* of civil liberties . . . in American jurisprudence.").

61. *Murdock*, 319 U.S. at 115; *Jones*, 316 U.S. at 608. Stone had also argued in *Jones* that the discretionary power of city officials to revoke a permit for the sale of literature created the same potential for discrimination that had condemned a permit requirement in *Lovell v. Griffin*, 303 U.S. 444 (1938), discussed in *Hughes II*, *supra* note 2. *Jones*, 316 U.S. at 600-03. Justice Reed reaffirmed *Lovell* in *Largent v. Texas*, 318 U.S. 418, 422 (1943); in *Jones*, he appropriately responded that the revocation provision was not at issue. 316 U.S. at 599-600.

62. See *Hughes II*, *supra* note 2 (discussing *Near v. Minnesota*, 283 U.S. 697 (1931) and *Lovell v. Griffin*, 303 U.S. 444 (1938)). See generally *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (no religious exemption from flag salute rule); *Reynolds v. United States*, 98 U.S. 145 (1879) (no religious exemption from polygamy laws), discussed in D. CURRIE, *supra* note 6, at 439-42. For an early effort to assimilate the criteria for infringements on freedom of religion to those on freedom of expression, see Summers, *The Sources and Limits of Religious Freedom*, 41 ILL. L. REV. 53 (1946).

63. 304 U.S. 144, 152 n.4 (1938).

64. Except for fees "commensurate with any expenses entailed by the presence of the

extreme position: "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon."⁶⁵

Justice Douglas' hackneyed argument that "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment" applied equally to the income and property taxes he professed to distinguish.⁶⁶ Additionally, there was no contention that the amounts demanded were oppressive or prohibitive.⁶⁷ Nevertheless there were aspects of the privilege tax that arguably justified Douglas' distinction.

First, the taxes in question were "fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues."⁶⁸ Accordingly, as Chief Justice Stone had said in analogizing to state taxes on persons engaged in interstate commerce, by its form alone "[t]he tax imposed . . . [was] more burdensome and destructive of the activity taxed than any gross receipts tax."⁶⁹ Payment of the tax, moreover, was made a condition of the right to sell literature because the sanction for nonpayment was denial of the

Witnesses," Murphy argued, "no tax whatever can be levied on petitioners' activities in distributing their literature or disseminating their ideas." *Jones*, 316 U.S. at 620 (Murphy, J., dissenting) (citing *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941), for the acceptability of fees to cover expenses caused by a parade); see *Hughes II*, *supra* note 2. But see *Murdock*, 319 U.S. at 131 (Reed, J., dissenting) ("The distributors of religious literature, possibly of all informative publications, become today privileged to carry on their occupations without contributing their share to the support of the government which provides the opportunity for the exercise of their liberties."); *id.* at 135 (Frankfurter, J., dissenting). Murphy also suggested that the tax had been discriminatorily applied. "[N]o attempt was . . . made to apply the ordinance to ministers functioning in a more orthodox manner than petitioner." *Jones*, 316 U.S. at 617 (Murphy, J., dissenting). A showing of discrimination would of course have condemned the tax, but the Court did not find discrimination in *Murdock*, and Justice Frankfurter insisted that no claim of discrimination had been made. *Murdock*, 319 U.S. at 135 (Frankfurter, J., dissenting).

65. 319 U.S. at 112.

66. *Id.* at 112; see also *id.* at 137 (Frankfurter, J., dissenting) (quoting Holmes' aphorism in *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928), that "'[t]he power to tax is not the power to destroy while this Court sits.'"). Justice Jackson added an embarrassing dissent of his own in which Justice Frankfurter joined, fulminating in what seemed a rather injudicious manner against the Witnesses' aggressive methods of spreading their message. *Id.* at 166-82 (Jackson, J., dissenting); cf. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) ("[T]he power to tax involves the power to destroy.").

67. See *Murdock*, 319 U.S. at 130 (Reed, J., dissenting); *id.* at 134-35 (Frankfurter, J., dissenting) ("No claim is made that the effect of these taxes, either separately or cumulatively, has been, or is likely to be, to restrict the petitioners' religious propaganda activities in any degree. Counsel expressly disclaim any such contention.").

68. *Id.* at 113 (Douglas, J.).

69. *Jones*, 316 U.S. at 609 (Stone, C.J., dissenting) (citing *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 55-57 (1940) (dictum)); cf. *Berwind-White*, 309 U.S. at 45 n.2. (taxes of a kind that two or more states might impose upon the same transaction were forbidden without regard to their amount because they placed interstate trade at a competitive disadvantage).

right itself.⁷⁰ As Justice Douglas also suggested, commerce clause precedents had long insisted that the payment of a tax not unduly burdensome in itself could not be made a condition of exercising the federal right to engage in interstate commerce.⁷¹ While interstate commerce could be required to pay its own way, it could not be prohibited. Finally, the requirement that the speaker obtain a license to speak conjured up visions of the censorship that had been at the heart of the historic opposition to limitations on free expression. Though the requirement left the licensing authority no discretion to deny a permit to anyone tendering payment of the tax, it bore more than a little resemblance to the classic "previous restraint."⁷² *Jones and Murdock* were anything but easy cases, yet they did not hold that speech, press, or religion must be exempted from paying their share of the cost of governing.

C. Doorbells and Flags

In *Martin v. City of Struthers*,⁷³ decided the same day as *Murdock* and by the same vote, the Jehovah's Witnesses won another great victory as Justice Black wrote to strike down an ordinance forbidding door-to-door distribution of handbills, circulars, and other forms of advertisements.⁷⁴ Conceding that "the peace, good order, and comfort of the community may imperatively require regulation of the time, place and manner of distribution" and that the homeowner's privacy was a legitimate state concern,⁷⁵ Black convincingly argued that the means selected to assuage it went too far. Black emphasized that "door to door distribution of circulars [was] essential to the poorly financed causes of little people" and that the city had substituted its judgment for that of the householders, some of whom might wish to receive the message.⁷⁶ The interest in privacy, he concluded, could be adequately

70. See *Murdock*, 319 U.S. at 106, 114 ("It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment.").

71. See *id.* at 113; cf., e.g., *Postal Tel. Cable Co. v. Adams*, 155 U.S. 688, 698 (1895) (Fuller, C.J.) (dictum).

72. See, *Murdock*, 319 U.S. at 114 ("[I]t restrains in advance those constitutional liberties of press and religion . . ."); cf. *Cox v. New Hampshire*, 312 U.S. 569 (1941) (upholding permit requirement limited to traffic concerns); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (striking down permit requirement for distribution of literature as previous restraint); *Hughes II*, *supra* note 2.

73. 319 U.S. 141 (1943).

74. *Id.* at 142; see also *id.* at 152 (Frankfurter, J., dissenting); *id.* at 154 (Reed, J., dissenting); *id.* at 157, 166, 181-82 (Jackson, J., dissenting). That the ordinance discriminated against speakers and in favor of salesmen made it immediately suspect, but the Court chose a broader ground of decision.

75. *Id.* at 143.

76. *Id.* at 146.

protected by making it an offense "to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed."⁷⁷ Like the handbilling and picketing decisions, *Martin* seemed to strike an admirable balance between competing interests.⁷⁸

One of the oddest aspects of the license-tax litigation was a separate dissent by Justices Black, Douglas, and Murphy in *Jones* signaling their repentance for having voted in *Minersville School District v. Gobitis*,⁷⁹ over Stone's lone dissent, to sustain the requirement that Jehovah's Witnesses salute the flag.⁸⁰ Justices Hughes and McReynolds, who also had joined the majority in *Gobitis*, had since given way to Justices Jackson and Rutledge, both of whom joined in a six-to-three opinion by the former in the famous case of *West Virginia State Board of Education v. Barnette*,⁸¹ where the Court reversed itself on this issue too.⁸²

Justice Stone's earlier dissent had suggested that those with religious objections were entitled to a special exemption from what he seemed to assume was an otherwise valid requirement, and so had the brief statement of the three converts in *Jones*.⁸³ Jackson's magnificent "opinion of the Court" in *Barnette*, however, took a broader tack by proclaiming that *no one* could be compelled to salute the flag. Freedom of speech included the freedom not to speak; no state interest in inculcating patriotism justified such an infringement upon individual autonomy.⁸⁴

77. *Id.* at 148.

78. See *supra* notes 27-42 and accompanying text (discussing the picketing cases); *cf.* Hughes II, *supra* note 2 (discussing *Schneider v. State*, 308 U.S. 147 (1939)).

79. 310 U.S. 586 (1940).

80. *Id.*, discussed in Hughes II, *supra* note 2; *id.* at 601-07 (Stone, C.J., dissenting); *Jones v. Opelika*, 316 U.S. 584, 623-24 (1942) (Black, Douglas, & Murphy, JJ., dissenting) (describing both cases as sanctioning "device[s] which . . . suppress[] or tend[] to suppress the free exercise of a religion practiced by a minority group"). *Gobitis* was met with virtually unanimous scholarly criticism. See Heller, *A Turning Point for Religious Liberty*, 29 VA. L. REV. 440, 450-53 (1943) (collecting the authorities).

81. 319 U.S. 624 (1943) (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)).

82. *Id.* at 642; see also *id.* at 642-43 (Roberts & Reed, JJ., dissenting); *id.* at 646-71 (Frankfurter, J., dissenting).

83. See *supra* note 80.

84. See *Barnette*, 319 U.S. at 634-35 ("Nor does the issue as we see it turn on one's possession of particular religious views It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty."); *id.* at 633 n.13 (citing William Tell's legendary refusal to salute a bailiff's hat and William Penn's refusal to uncover his head in deference to civil authority); *id.* at 634 ("To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."); *id.* at 641 ("Ultimate futility of such attempts to compel coherence is the lesson or every such effort from the Roman drive to stamp out Christianity as

In announcing this eminently appropriate assessment of the competing interests, Justice Jackson went out of his way to endorse Justice Stone's suggestion in *Carolene Products* that measures affecting first amendment freedoms were subject to much stricter scrutiny than those in which the due process clause was "applied for its own sake."⁸⁵ Jackson stated:

The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.⁸⁶

Justice Frankfurter's famous dissent left no doubt that he rejected this distinction in toto:

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power

a disturber of its pagan unity, the Inquisition, as a means to dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. . . . To believe that patriotism will not flourish if patriotic ceremonies are voluntary . . . is to make an unflattering estimate of the appeal of our institutions to free minds." Justices Black, Douglas, and Murphy wrote separate opinions invoking religious freedom, but they did not disown Jackson's "opinion of the Court." See *id.* at 643 (Black & Douglas, JJ., concurring) ("We are substantially in agreement with the opinion [of Jackson] just read . . ."); *id.* at 644 (Murphy, J., concurring) ("I agree with the opinion of the Court and join in it."); see also *id.* at 632-33 (Jackson, J.) (reaffirming that freedom of expression embraced communicative actions as well as words: "Symbolism is a primitive but effective way of communicating ideas."); Hughes II, *supra* note 2 (discussing *Stromberg v. California*, 283 U.S. 359 (1931)).

The implication of the two flag salute cases that freedom of religion did not require exemptions from generally applicable laws was reinforced the following term when the Court upheld application of child labor laws to the proselytizing activities of Jehovah's Witnesses in *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944) (Rutledge, J.) (reaffirming that first amendment freedoms made applicable to the states by due process enjoyed a "preferred position in our basic scheme"). Murphy filed the expected dissent. *Id.* at 171-76 (Murphy, J., dissenting). Justice Jackson, joined by Justices Roberts and Frankfurter, petulantly concluded that the distinguishable decision in *Murdock*, from which they had dissented, required them to vote to reverse the judgment sustaining the application of the child-labor law although they believed it correct. *Id.* at 176-78 (Jackson, J., dissenting).

85. *Barnette*, 319 U.S. at 639.

86. *Id.* at 639.

when dealing with one phase of 'liberty' than with another Our power does not vary according to the particular provision of the Bill of Rights which is invoked. . . . [W]henever legislation is sought to be nullified on any ground, . . . responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.⁸⁷

In so saying, Justice Frankfurter laid bare the fundamental cause of the unbridgeable abyss that separated New Deal Justices who had all agreed in burying economic due process. Justices Stone, Black, and Jackson were no less adamant than Frankfurter that the catastrophe of *Lochner v. New York*⁸⁸ must not be repeated, but they disagreed sharply as to the means of preventing it. The majority of the Justices had a narrow conception of substantive due process; Justice Frankfurter had a narrow conception of judicial review.

The majority had yet to give a satisfactory answer to Justice Frankfurter's question of how measures impinging on different "liberties" could be given different levels of scrutiny in applying the due process clause to evaluate state action.⁸⁹ His reference to the Bill of Rights and his further insistence that the question was the same as if an act of Congress had been involved,⁹⁰ however, made clear that his disagreement with the majority was broader. He seemed to have concluded that the only way to protect against further abuses like *Lochner* was to minimize judicial authority to enforce any constitutional provisions.⁹¹

87. *Id.* at 648-49 (Frankfurter, J., dissenting).

88. 198 U.S. 45 (1905).

89. See Stone I, *supra* note 1, at 13-15.

90. *Barnette*, 319 U.S. at 650 (Frankfurter, J., dissenting).

91. See *id.* at 666 (Frankfurter, J., dissenting). Justice Frankfurter wrote:

The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern.

Id. (Frankfurter, J., dissenting). For his Spartan view of the judicial function, Justice Frankfurter invoked Justice Holmes, whose pungent dissent in *Lochner* had served more than anything else to call attention to the problem. See *id.* at 649 (quoting *Missouri, K. & T. Ry. v. May*, 194 U.S. 267, 270 (1904)); *Lochner*, 198 U.S. at 75, discussed in Fuller I, *supra* note 6, at 378-82. Significantly, however, despite suggestions in his earlier opinions, Holmes himself had abandoned the position for which Frankfurter cited him. See White, *supra* note 6, at 1145-52. Several of his most illustrious opinions attest that his standards for reviewing claims both of free expression and of uncompensated takings were far stricter than those he applied in ordinary substantive due process cases. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925)

Justice Jackson recognized in *Barnette* that it was not necessary to stop enforcing limitations that were in the Constitution in order to avoid imposing others that were not. In his sincere concern to keep judges from exceeding their constitutional authority, Justice Frankfurter came perilously close to repudiating that authority itself.⁹²

III. CRIMINAL PROCEDURE

The basic dispute over the intrusiveness of judicial review that characterized the Stone Court's encounters with the "specific prohibitions" of the first amendment emerged in other fields as well. In *Powell v. Alabama*,⁹³ for example, where "ignorant" defendants had been sentenced to death for rape, the Court broke new ground in a noble 1932 opinion by Justice Sutherland by holding that the due process clause required a state to provide lawyers to defendants unable to employ their own: "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."⁹⁴ Ten years later, in *Betts v. Brady*,⁹⁵ a divided Court nevertheless upheld a state robbery conviction although the defendant's request for an assigned attorney had been denied.

In concluding in *Betts* that the right to assigned counsel in such cases was not "fundamental," Justice Roberts relied largely on the absence of such a right in the colonies and in many state constitutions.⁹⁶ If practice was to be a guide, however, Justice Black furnished food for thought in noting that thirty-five states provided for appointing counsel in noncapital cases by either constitution, statute, or judicial custom.⁹⁷ More important, neither history nor practice had been the basis of *Powell*, and it was equally true in noncapital cases that a trial without counsel was no trial at all.⁹⁸

(Holmes, J., dissenting), discussed in Taft, *supra* note 20, at 82-88; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), discussed in Taft, *supra* note 20, at 92-99; *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting), discussed in White, *supra* note 6, at 1152-55. Following Holmes' example in accordance with *Carolene Products'* suggestion respecting "specific prohibition[s]" of the Constitution, the Court was far from deferential in upholding (over dissents by Justices Black and Burton) a taking claim based on the low flight of airplanes over the plaintiff's land in *United States v. Causby*, 328 U.S. 256 (1946) (Douglas, J.).

92. See Kalven, Book Review, 37 IND. L.J. 572, 577 (1962) (reviewing W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (1961)) ("[W]hy should any one have preferred the setting up of this anemic check to the simplicity of not having judicial review at all?").

93. 287 U.S. 45, 173 (1932).

94. *Id.* at 69; Hughes II, *supra* note 2.

95. 316 U.S. 455 (1942) (Roberts, J.).

96. *Id.* at 465-72.

97. See *id.* at 477 & n.2 (Black, J., dissenting).

98. In reliance on *Powell*, the Court had declared that the sixth amendment entitled every

The Court displayed neither judicial restraint nor concern for state autonomy in *Powell* or in its other criminal procedure decisions of the early 1930's.⁹⁹ In 1937, however, in *Palko v. Connecticut*,¹⁰⁰ Justice Cardozo employed language reminiscent of the hands-off attitude that characterized economic cases of the later Hughes period in arguing that right-minded men could reasonably believe that permitting the state to appeal an acquittal was not "repugnant to the conscience of mankind."¹⁰¹ In echoing this language, *Betts* showed how miserly such an attitude could be by largely abandoning a right that even the Justices of the early 1930's had rightly deemed fundamental. In order to find that convicting a defendant with no lawyer to defend him was not "offensive to the common and fundamental ideas of fairness and right"¹⁰² the Justices needed, as Justice Black protested, a very thick skin.¹⁰³

Only Justices Douglas and Murphy joined Justice Black in his dissent in *Betts*. Justice Rutledge had not yet been appointed. It was interesting that Chief Justice Stone voted with the majority after his suggestion in *Carolene Products* of more aggressive review in cases involving "specific prohibition[s] . . . such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."¹⁰⁴ Apparently, while freedom of speech was made "specific[ally]" applicable to the states because it was so fundamental, the right to assigned counsel was not because it was fundamental only in certain cases.¹⁰⁵

In rejecting this subtle distinction, Justice Black, who had joined the *Palko* majority, first suggested the sweeping doctrine for which his dissent in *Adamson v. California*¹⁰⁶ would soon make him famous. Legislative history showed, Black argued in *Betts*, that the purpose of the fourteenth amend-

impoverished federal criminal defendant to assigned counsel. *Johnson v. Zerbst*, 304 U.S. 458, 462-63, 467 (1938).

99. For a discussion of the decisions, see *Hughes II*, *supra* note 2.

100. 302 U.S. 319 (1937).

101. *Id.* at 323.

102. *Betts v. Brady*, 316 U.S. 455, 473 (1942).

103. *Id.* at 475-76 (Black, J., dissenting).

104. See 304 U.S. 144, 152 n.4 (1938). Other criminal procedure decisions of the Stone period are summarized in Boskey & Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. CHI. L. REV. 266 (1946).

105. See *Betts*, 316 U.S. at 461-62. The Court stated:

The due process clause of the fourteenth amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may . . . operate, in a given case, to deprive a litigant of due process of law

Id.

106. 332 U.S. 46 (1947).

ment was "to make secure against invasion by the states the fundamental liberties and safeguards set out in the Bill of Rights," including the right to counsel:¹⁰⁷ "I believe that the fourteenth amendment made the sixth amendment applicable to the states."¹⁰⁸ This position had been rejected before, and there were troublesome arguments against it.¹⁰⁹ However, if the Senate spokesman for the amendment was correct in saying that it made all the protections of the Bill of Rights "privileges and immunities of citizens of the United States" binding the states as well,¹¹⁰ then it was not inconsistent after all to enforce these rights aggressively against the states while essentially abandoning substantive due process; for in this view, their applicability to the states did not depend on that discredited doctrine at all.

IV. INSULAR MINORITIES AND POLITICAL PROCESSES

A. Blacks

Carolene Products hinted at strict enforcement not only of "specific" constitutional prohibitions—which should have included the equal protection clause and the fifteenth amendment's ban on racial denial of the vote—but also of provisions protecting "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or the rights of "discrete and insular minorities."¹¹¹ These two categories coalesced in *Smith v. Allwright*,¹¹² a case involving a white primary, where the Court delivered one of its greatest blows both for the equality of blacks and for the integrity of our political system.

Although the Court struck down the exclusion of blacks from primary elections whenever it could find the state responsible, it had felt stymied in *Grovey v. Townsend*,¹¹³ where the discriminatory decision had been made by a party convention.¹¹⁴ Nine years after *Grovey*, in *Smith*, the Court changed its mind. On second thought, the discrimination could be pinned on the state.¹¹⁵

107. 316 U.S. at 474 & n.1 (Black, J., dissenting); cf. *Adamson*, 332 U.S. at 68-123 (Black, J., dissenting).

108. *Betts*, 316 U.S. at 474 (Black, J., dissenting).

109. See D. CURRIE, *supra* note 6, at 342-51, 363-68 (discussing the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873)).

110. CONG. GLOBE, 39th Cong., 1st Sess. 2764-66 (1866) (remarks of Senator Howard).

111. See *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

112. 321 U.S. 649 (1944) (overruling *Grovey v. Townsend*, 295 U.S. 45 (1935)).

113. 295 U.S. 45 (1935), *overruled*, *Smith v. Allwright*, 321 U.S. 649 (1944).

114. See *Hughes II*, *supra* note 2 (discussing *Grovey*, 295 U.S. 45 (1935)).

115. Only Justice Roberts, author of *Grovey* and one of the two remaining Justices who had then been on the Court, dissented. *Smith*, 321 U.S. at 666-70 (Roberts, J., dissenting). There was irony in his protest against the Court's willingness to overrule precedents, since Roberts

Justice Reed's opinion relied in substantial part on state regulation of the party, which the *Grovey* Court had found insufficient. Justice Reed noted that state law provided for the election of party officers and delegates to the party convention and that state statutes set the fees to be paid by candidates to defray costs of the primary elections. Additionally, state courts had jurisdiction "to compel party officers to perform their statutory duties."¹¹⁶ Thus, according to Reed, "[p]rimary elections [were] conducted by the party under state statutory authority" and "[t]he party [took] its character as a state agency from the duties imposed upon it by state statutes."¹¹⁷

All of this was pretty flimsy, and none of it seemed to distinguish political parties from other associations or individuals whose activities were regulated by state law. Such arguments, if taken at face value, could have largely obliterated the constitutional distinction between public and private action.¹¹⁸ Not only was the Court, in conformity with Stone's dictum, showing precious little restraint in protecting minorities and the political process,¹¹⁹ it also seemed to be stretching the Constitution in order to do so.

After Stone's death, the Justices had to find a new rationale for their decision in *Terry v. Adams*¹²⁰ that the "Jaybird Democratic Association's" lily-white preprimary must be struck down. As Justice Minton protested in a lone dissent, the preprimary was not regulated by the state at all.¹²¹ Justice Black, joined by Justices Douglas and Burton, seemed to argue that the state

himself is best known for voting to overrule decisions invalidating minimum wage laws in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), discussed in Hughes I, *supra* note 3, at 542-43.

The majority professed to find support for its change of mind in *United States v. Classic*, 313 U.S. 299 (1941) (Stone, J.), which had repudiated the parsimonious conclusion in *Newberry v. United States*, 256 U.S. 232 (1921), that Congress' article I authority over federal "elections" did not include primaries. See White, *supra* note 6, at 1128 n.88. *Classic* enabled the Court in *Smith* to base its conclusion on the more obviously relevant fifteenth amendment rather than the equal protection clause, which was the basis of two earlier cases striking down state exclusion of blacks from primaries. See *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927). It was of no direct relevance to the problem that had precluded relief in *Grovey*, however, for *Classic* involved both actions of state officials and a provision that did not require state action. The fifteenth amendment, like the fourteenth, applies to the "State[s]" and also, unlike the latter, to the United States. Compare U.S. CONST. amend. XIV with U.S. CONST. amend. XV.

116. *Smith*, 321 U.S. at 663.

117. *Id.*

118. See D. CURRIE, *supra* note 6, at 398-402 (discussing The Civil Rights Cases, 109 U.S. 3 (1883)).

119. See *Smith*, 321 U.S. at 662 ("Despite Texas' decision that the exclusion is produced by private or party action, . . . federal courts must for themselves appraise the facts leading to that conclusion."); see also Hughes II, *supra* note 2 (discussing *Norris v. Alabama*, 294 U.S. 587 (1935)).

120. 345 U.S. 461 (1953).

121. *Id.* at 485 (Minton, J., dissenting).

was responsible for private discrimination because it had not prohibited it. Black's thesis would wholly eliminate the requirement of state action.¹²² Justice Frankfurter, in arguing that state officers had "participated in" the discriminatory scheme "by voting in the Jaybird primary," ignored the distinction between public and private acts of state officials on which he himself had most zealously insisted in other cases.¹²³ Justice Clark, writing for the remaining four members of the Court, seemed to put his finger on a more promising argument:

[T]he Jaybird Democratic Association is the decisive power in the county's recognized electoral process. . . . [W]hen a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play.¹²⁴

This argument takes on meaning from Justice Black's opinion in *Marsh v. Alabama*,¹²⁵ one of the Court's last pronouncements before Stone's death in 1946. That case followed *Lovell v. City of Griffin*¹²⁶ and other precedents in forbidding a municipality to bar the sidewalk distribution of literature or to condition it on a permit that could be denied at will.¹²⁷ There was just one difference between *Marsh* and the earlier cases: the municipality in *Marsh* was a company town.

Chickasaw, Alabama, where the case arose, was owned and governed by

122. *Id.* at 469 (opinion of Black, J.) ("For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment."); see also *id.* at 485 (Minton, J., dissenting) ("As I understand Mr. Justice Black's opinion, he would have this Court redress the wrong even if it was individual action alone.").

123. See *id.* at 473-77 (opinion of Frankfurter, J.); *id.* at 485 (Minton, J., dissenting) (adding that the record contained no evidence that officials had participated in the primary); cf. *Monroe v. Pape*, 365 U.S. 167, 202-59 (1961) (Frankfurter, J., dissenting) (taking a similar view of the "under color of" state law requirement of 42 U.S.C. § 1983 (1982)); *Snowden v. Hughes*, 321 U.S. 1, 17 (1944) (Frankfurter, J., concurring) ("I am unable to grasp the principle on which the State can here be said to deny the plaintiff the equal protection of the laws of the State when the foundation of his claim is that the Board had disobeyed the authentic command of the State.").

124. *Terry*, 345 U.S. at 484 (Clark, J., concurring); cf. *id.* at 469 (opinion of Black, J.) ("The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. . . . The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county.").

125. 326 U.S. 501 (1946).

126. 303 U.S. 444 (1938).

127. *Marsh*, 326 U.S. at 504 (citing *Lovell*, 303 U.S. 444 (1938)); see also *Hughes II*, *supra* note 2.

the Gulf Shipbuilding Corporation.¹²⁸ Justice Reed, joined by Chief Justice Stone and Justice Burton, objected that *Marsh* was "the first case to extend by law the privilege of religious exercises . . . to private places without the assent of the owner."¹²⁹ Justice Black demurred, arguing that the corporation's right to control the residents of Chickasaw was not "coextensive with the right of a homeowner to regulate the conduct of his guests."¹³⁰ "[A] company-owned town," as Frankfurter succinctly stated in a concurring opinion, "is a town."¹³¹ Except for the question of title, Black added, there was "nothing to distinguish Chickasaw from any other town,"¹³² and the public interest in open channels of communication was the same.¹³³

Those who govern, in other words, are the "state" within the meaning of the fourteenth amendment. The purposes of the amendment are applicable to all who perform the functions of government, whether they are elected, appointed, or otherwise private persons. That seems to be what Justice Clark was suggesting when he noted in *Terry* that the Jaybird organization had "take[n] on those attributes of government which draw the Constitution's safeguards into play."¹³⁴ Justice Reed, despite his *Marsh* dissent and his stress on ephemeral traces of state regulation, intimated the same thing in *Smith* when he commented that "recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State."¹³⁵

Like governing itself, the election of those who govern is such a central state function that whoever controls it is the "state" within the meaning of constitutional limitations. That test, like most, would present nasty line-drawing problems. Yet it seemed much more faithful to the purposes of the framers than any of the more sweeping theories that had been offered in an

128. *Marsh*, 326 U.S. at 502-03; *id.* at 513 (Reed, J., dissenting) (Company towns "may be essential to furnish proper and convenient living conditions for employees on isolated operations in lumbering, mining, production of high explosives and large-scale farming."). "In the bituminous coal industry alone," Justice Black noted, "approximately one-half of the miners in the United States lived in company-owned houses in the period from 1922-23." *Id.* at 508 n.5.

129. *Id.* at 512 (Reed, J., dissenting).

130. *Id.* at 506.

131. *Id.* at 510 (Frankfurter, J., concurring).

132. *Id.* at 503.

133. *Id.* at 507.

134. *Terry v. Adams*, 345 U.S. 461, 484 (1953) (Clark, J., concurring).

135. *Smith v. Allwright*, 321 U.S. 649, 660 (1944); *see also id.* at 664 ("When primaries become a part of the machinery for choosing officials, state and national, . . . the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election."). For an approving view, see Cushman, *The Texas "White Primary" Case—Smith v. Allwright*, 30 CORNELL L.Q. 66 (1944).

effort to make the fifteenth amendment more than an empty formality. Moreover, it certainly suggested very little in the way of judicial restraint.

B. Other Outsiders

Because state regulations affecting interstate commerce often imposed burdens "principally upon those without the state," Justice Stone noted in *South Carolina Highway Department v. Barnwell Brothers*¹³⁶ in 1938, "legislative action [in such cases] is not likely to be subjected to those political restraints which are normally exerted on legislation." In light of these observations, it was understandable that Stone cited *Barnwell* in *Carolene Products* along with cases of racial and religious discrimination as examples of the arguable need for "more searching judicial inquiry" in cases involving "discrete and insular minorities."¹³⁷

Since geographical outsiders have no vote, they are in special need of constitutional protection. An efficient way to provide this protection, with relatively modest displacement of the normal political process, is to tie the fate of those who are not represented to that of those who are by forbidding discrimination.¹³⁸ The framers utilized this approach in article IV by requiring one state to afford citizens of another all the privileges and immunities of its own citizens. The same method was employed in the fourteenth, fifteenth, and nineteenth amendments to protect the interests of blacks and, later, of women. As Justice Stone explained in *Barnwell*, this approach also helps to explain the Court's longstanding insistence that interstate commerce may not be subjected to discriminatory burdens.¹³⁹

136. 303 U.S. 177, 185 n.2 (1938).

137. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Justice Stone also cited in this connection *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819), where Justice Marshall had made a similar argument in holding the Bank of the United States immune from state taxation. See D. CURRIE, *supra* note 6, at 165-68.

138. See J. ELY, *DEMOCRACY AND DISTRUST* 81-87 (1980).

139. See 303 U.S. at 185 (dictum) ("The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method . . ."); see also, e.g., *Welton v. Missouri*, 91 U.S. 275 (1876) (striking down state tax applicable only to out of state goods), discussed in D. CURRIE, *supra* note 6, at 404-05. Because local residents with normal political power may also engage in interstate transactions, the analogy to racial minorities is not perfect. Yet the presence of outside interests suggests that the concerns of interstate commerce may be underrepresented in the counsels of any one state.

Marshall's reasoning in the analogous field of intergovernmental immunity in *M'Culloch*, 17 U.S. (4 Wheat.) at 428, seemed to go further than this argument required. A ban limited to discriminatory taxes, such as that imposed in *M'Culloch* itself, would have given the national bank political protection by tying its fate to that of local institutions. Under Chief Justice Stone, recognizing that the United States could protect itself by legislation and that the states were adequately represented in Congress, the Court continued to chip away at intergovernmental immunities. See, e.g., *Case v. Bowles*, 327 U.S. 92 (1946) (Black, J.) (federal price

Edwards v. California,¹⁴⁰ abandoning ancient dicta in denying the right of a state to exclude paupers in the most important opinion of the short-tenured Justice Byrnes, properly reflected these concerns with the observation that "the indigent non-residents who are the real victims of this statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy."¹⁴¹ Justices Douglas, Black, and Murphy, evidently gearing up for an assault on the Court's commerce clause jurisprudence, argued instead that the state's action abridged the mysterious right to travel originally recognized in *Crandall v. Nevada*,¹⁴² which the *Slaughter-House Cases*¹⁴³ described as a privilege or immunity of national citizenship protected by the fourteenth amendment; Justice Jackson basically agreed.¹⁴⁴ Although Justice Douglas mentioned it in passing, none of the Justices relied on the most obvious constitutional basis for the decision: clear discrimination against citizens of other states in violation of the

regulation may apply to state timber sales), discussed in Stone I, *supra* note 1, at 33 n.187; *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261 (1943) (Stone, C.J.) (upholding application of state minimum price regulations to sale of milk to United States); *Alabama v. King & Boozer*, 314 U.S. 1 (1941) (Stone, C.J.) (upholding state tax on government contractor's purchase of building materials despite contract clause passing on all costs to United States). Neither Stone nor any other Justice voted, however, to abandon such immunities entirely or to limit that of the United States strictly to discriminatory measures. See, e.g., *United States v. Allegheny County*, 322 U.S. 174 (1944) (Jackson, J.) (striking down nondiscriminatory tax on government property). The immunity decisions of the period are discussed in Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633 (1945) and Powell, *The Remnant of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 757 (1945).

140. 314 U.S. 160 (1941).

141. *Id.* at 174. *Contra, e.g.*, *New York v. Miln*, 36 U.S. (11 Pet.) 102, 142-43 (1837) (upholding requirement that ship captains furnish authorities with passenger lists with the observation that states had right to protect themselves against "the moral pestilence of paupers, vagabonds, and possibly convicts"). The question of state authority to exclude paupers had been reserved in *Henderson v. Mayor of New York*, 92 U.S. 259, 275 (1876), where a bond requirement had been struck down as a means of coercing payment of a forbidden tax.

142. 73 U.S. (6 Wall.) 35 (1868), discussed in D. CURRIE, *supra* note 6, at 355-57.

143. 83 U.S. (16 Wall.) 36, 79 (1873), discussed in D. CURRIE, *supra* note 6, at 342-50.

144. See *Edwards*, 314 U.S. at 177-81 (Douglas, J., concurring); *id.* at 181-86 (Jackson, J., concurring). Justice Jackson, while conceding that Justice Byrnes' commerce clause ground was "permissible . . . under applicable authorities," also emphasized the *Crandall* argument, reopening a controversy long considered settled, by suggesting that "the migrations of a human being . . . do not fit easily into my notions as to what is commerce." *Id.* at 181-82; cf. *Passenger Cases*, 48 U.S. (7 How.) 283 (1849); *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841); D. CURRIE, *supra* note 6, at 168-69 & n.78, 222-30 (discussing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)). Byrnes' first draft had reportedly based the decision on the privileges or immunities clause, but Stone talked him out of it by reminding him of the mischief that Old Guard Justices had attempted under that provision. See A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 578-80 (1956); Hughes I, *supra* note 3, at 539-40 (discussing *Colgate v. Harvey*, 296 U.S. 404 (1935)).

privileges and immunities clause of article IV.¹⁴⁵

In *Barnwell*, Justice Stone had come close to saying that the states could regulate commerce so long as they did not discriminate against it.¹⁴⁶ Justice Douglas echoed this position in his dissent in *Southern Pacific Co. v. Arizona*,¹⁴⁷ where the majority struck down a nondiscriminatory provision limiting the length of trains. Justice Black, in a separate dissent in *Southern Pacific*, seemed to question the entire notion that the commerce clause limited state power, suggesting that the Court should be "at least" as deferential to state legislatures in this field as it was in substantive due process cases.¹⁴⁸ The Chief Justice, however, took the occasion to entrench for the majority his original position that the validity of nondiscriminatory state regulations affecting commerce turned on "accommodation of the competing demands of the state and national interests involved."¹⁴⁹

The dubious safety advantages of the train length law sufficiently distinguish *Southern Pacific* from *Barnwell*, which had upheld an obviously reasonable limitation of the width of trucks.¹⁵⁰ The tone of the two opinions,

145. "[T]here are expressions in the cases that this right of free movement of persons is an incident of state citizenship protected against discriminatory state action by Art. IV, § 2 of the Constitution." *Edwards*, 314 U.S. at 180 (Douglas, J., concurring) (emphasis in original). The Court consistently applied this provision according to its purpose of preventing one state from discriminating against citizens of another. See D. CURRIE, *supra* note 6, at 348 & n.137. In addition, the Articles of Confederation, from which the clause was taken, had expressly included the right of "free ingress and regress to and from any other State"—not qualified to except "paupers, vagabonds, and fugitives from justice," as was the basic provision itself at the time. Articles of Confederation, art. 4. It seems most unlikely that in omitting the explanatory clause respecting the right of entry, the framers of the present Constitution, which generally increased the restrictions on state authority, meant to empower one state to deny another's citizens the most fundamental privilege of all.

146. Stone stated:

In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.

Barnwell, 303 U.S. at 189.

147. 325 U.S. 761, 795-96 (1945) (Douglas, J., dissenting) ("My view has been that the courts should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted.").

148. *Id.* at 792 (Black, J., dissenting).

149. *Id.* at 769; see also *Parker v. Brown*, 317 U.S. 341, 362 (1943) (Stone, C.J.) (applying same test to uphold state restrictions on marketing of raisins); *Di Santo v. Pennsylvania*, 273 U.S. 34, 44 (1927) (Stone, J., dissenting).

150. See *Southern Pacific*, 325 U.S. at 781-82 (The state's "regulation of train lengths, admittedly obstructive to interstate train operation, . . . passes beyond what is plainly essential for safety since it does not appear that it will lessen rather than increase the danger of accident."); *Barnwell*, 303 U.S. at 196 (noting that the use of 96-inch trucks on roads with 96-inch lanes "tends to force other traffic off the concrete surface"); see also *id.* at 191-96 (upholding a gross-weight limitation designed to prevent road damage over the objection that limitations on

however, was significantly different. While *Barnwell* had intimated that even severe burdens on commerce were permissible in the absence of discrimination, *Southern Pacific* declared that the states had wide scope for regulation of matters of local concern "provided it [did] not materially restrict the free flow of commerce across state lines."¹⁵¹ The contrast between the deferential tone of *Barnwell* and the unabashed activism of *Southern Pacific* suggests that Stone's thinking about the commerce clause had undergone some evolution in the intervening years.

In aggressively applying a balancing test for determining the reasonableness of laws that imposed neither discriminatory nor cumulative burdens on interstate trade, Chief Justice Stone seemed to go beyond *Barnwell*'s explanation that relatively strict scrutiny was necessary to protect politically impotent outsiders from competitive disadvantage. In so doing, however, he merely made explicit what the Court had basically been doing for nearly a century.¹⁵² By stressing the distinct national interest in unimpeded interstate transportation, moreover, he seemed to assimilate the implicit limitation of the commerce clause on state power to those "specific prohibitions" which, like those of the Bill of Rights, were also candidates for less restrained judicial enforcement under *Carolene Products*. In short, like Justice Jackson in *Barnette* and Justice Black in *Betts*, the Chief Justice seemed to make clear in *Southern Pacific* that his objection to the economic activism of the days before 1937 was to substantive due process, not to aggressive judicial review.

C. Interstate Relations

Like the privileges and immunities clause of the same article, the full faith and credit clause of article IV was designed to protect unrepresented out of state interests in the name of interstate harmony—in this case the legitimate interests of other states in recognition of their governmental acts. In light of his heightened concern for the politically powerless in *Carolene Products*, it seems surprising that Stone's signal contribution to this field was to replace the traditional strict scrutiny of state choice of law decisions with a deferential analysis that permitted any interested state to resolve conflicts in its own favor.¹⁵³

weight per axle would have sufficed). Chief Justice Stone's explicit basis for distinguishing the two cases—the state's ownership of its highways—seemed less compelling. *Southern Pacific*, 325 U.S. at 783; cf. *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (striking down highway regulation that exposed interstate truckers to contradictory requirements in different states).

151. See *Southern Pacific*, 325 U.S. at 770; *Barnwell*, 303 U.S. at 189.

152. See Fuller I, *supra* note 6, at 366-69.

153. See *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) (Stone,

Unlike the equally deferential commerce clause views he had expressed in *Barnwell*, this interest analysis continued to determine interstate choice of law decisions after Stone's elevation to Chief Justice.¹⁵⁴ Once the rights of the parties had been determined by litigation, however, Stone was faithful to his own aggressive prior position that the policy of finality embodied in the full faith clause required even an interested state to respect another state's judgment.¹⁵⁵

J.); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939) (Stone, J.) (allowing either state of accident or of contract to apply its own workers' compensation law); *Hughes I*, *supra* note 3, at 548-50. It was understandable that Stone would reject the Procrustean notion that only the state where an event occurred had any legitimate concern in its regulation, but his theory of unrepresented interests might have led him to attempt to determine which state's interest was the greater. Cf. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945). But see Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1235 (1946) ("[P]roblems of choice of law have not lent themselves to satisfactory solution as constitutional questions, and . . . in their nature they cannot be expected to.").

154. See *State Farm Mut. Auto Ins. Co. v. Duel*, 324 U.S. 154, 158, 160 (1945) (Douglas, J.) (state may determine amount of reserve out-of-state insurer must maintain to satisfy claims by insured residents); *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210-11 (1941) (Stone, C.J.) (state may apply own law to determine whether resident has become member of out of state corporation and thus liable for share of its debts); see also Freund, *supra* note 153, at 1232. Freund, noting the "notable latitude" left the states by the *Pink* decision, stated, "If choice of law in commercial transactions is to be subjected to some extent to the unifying force of the full faith and credit clause, there could scarcely be a more appropriate matter for such treatment than the relation of a policyholder to his company" *Id.*

155. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943) (one state's workers' compensation award bars second claim for same injury in second state). Chief Justice Stone distinguished between statutes and judgments and stressed "the clear purpose of the full faith and credit clause to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered." *Id.* at 436-39; see Freund, *supra* note 153, at 1225-30; see also *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935) (Stone, J.) (requiring state to respect sister-state judgment for taxes); *Yarborough v. Yarborough*, 290 U.S. 202 (1933) (forbidding state to grant child support beyond that provided by sister-state decree); *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (requiring state to respect judgment on gambling contract contrary to its public policy), discussed in Fuller II, *supra* note 18, at 883-86; Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt*, 44 COLUM. L. REV. 330 (1944) (arguing that workers' compensation should be treated as an exceptional case). Stone had let sympathy draw him from this path in *Yarborough*, 290 U.S. at 213-27 (Stone, J., dissenting), but since then he had been the Court's leading spokesman for a strict interstate res judicata policy.

The award given binding effect in *Magnolia* was that of an administrative agency rather than of a court, but, as Stone said, the policy of the clause was unaffected by the label: Whether the proceeding was a "judicial" one or its award a "record," the clause required both to be equally respected. 320 U.S. at 443. Justice Black, writing for the four dissenters, made the more serious objection that the first state's tribunal had had no jurisdiction to decide claims under any other state's law: "The decision of this Court today, therefore, is tantamount to holding that Texas intended to extinguish a claim against the employer in a proceeding in which . . . liability under Louisiana law was not allowed to be raised." *Id.* at 453. Jurisdiction to decide

The critical assumption on which this clause subordinates the interest of one state to another state's interest in finality, however, is that the litigant have a reasonable opportunity to present his case in the forum whose judgment is sought to be enforced.¹⁵⁶ This assumption fails when a judgment is pleaded against one who was not a party to the initial litigation and when the parties have every incentive to frustrate the nonparty's legitimate interest. Thus it was entirely appropriate for the Court in *Williams v. North Carolina*¹⁵⁷ to hold that a foreign divorce decree did not preclude a state from prosecuting for bigamy two of its residents who had remarried after traveling to another state for the sole purpose of evading the strict divorce limitations of their home state.

The Court had shown less concern for the interest of the stay-at-home spouse whose partner had fled to Nevada by holding, in an earlier chapter of the same litigation, that a divorce was valid though the defendant never had any contact with the divorcing state.¹⁵⁸ Thus, as Justice Jackson succinctly stated in his dissent, the Court held that "settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect on a grocery bill."¹⁵⁹ Unless one concludes that the absent spouse was not substantially harmed because the marriages in question existed in name only,¹⁶⁰ this decision seems hardly reconcilable with the modern standard of "minimum contacts, . . . 'fair play and substantial justice' " that

had always been a condition of full faith and credit. See *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1851). Unless filing a claim under one state's law fairly can be held an election, there are due process difficulties in allowing a tribunal to destroy rights it has no jurisdiction to enforce. See *Hansberry v. Lee*, 311 U.S. 32 (1940) (Stone, J.) (holding due process forbade enforcing judgment against nonparty).

A few years after *Magnolia*, in *Industrial Comm'n v. McCartin*, 330 U.S. 622, 627-28 (1947) (Murphy, J.), a unanimous Court sensibly permitted a second state to give further compensation after concluding that the first tribunal had intended to preclude further relief only under its own law. For the subsequent fate of these decisions, see *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980), in which six Justices voted to repudiate *McCartin* and four voted to overrule *Magnolia* as well.

156. See *Hansberry*, 311 U.S. at 40-45; Fuller II, *supra* note 18, at 883-97.

157. 325 U.S. 226 (Frankfurter, J.), *reh'g denied*, 325 U.S. 898 (1945); see also Lorenzen, *Extraterritorial Divorce—Williams v. North Carolina II*, 54 YALE L.J. 799, 801-02 (1945) ("[A] divorce decree in such circumstances appears more like an interference by Nevada in the marital relations of North Carolinians . . .").

158. *Williams v. North Carolina*, 317 U.S. 287 (1942) (Douglas, J.) (overruling *Haddock v. Haddock*, 201 U.S. 562 (1906)); see Fuller II, *supra* note 18, at 894-97.

159. *Williams*, 317 U.S. at 316 (Jackson, J., dissenting).

160. See Currie, *Suitcase Divorce in the Conflict of Laws*, 34 U. CHI. L. REV. 26, 29 (1966). The author based this suggestion on *Estin v. Estin*, 334 U.S. 541, 546-48 (1948), and *May v. Anderson*, 345 U.S. 528, 534 (1953), which had reduced the impact of an *ex parte* divorce by holding it could not cut off rights to alimony or child custody. But see *Simons v. Miami Beach First Nat'l Bank*, 381 U.S. 81 (1965) (holding *ex parte* divorce extinguishes right to dower).

Chief Justice Stone would soon enunciate to determine whether a state's exercise of personal jurisdiction was consistent with due process in *International Shoe Co. v. Washington*.¹⁶¹

In *International Shoe*, decided only a few months before his death, Chief Justice Stone did for the law of personal jurisdiction what he had done ever since his appointment for full faith and credit, intergovernmental immunity, extraterritorial taxation, and state laws affecting interstate commerce.¹⁶² He brought order out of chaos, brought out of the closet the functional considerations that had often underlain earlier decisions, and laid down sensible criteria that have governed ever since.¹⁶³

D. Representation

The famous 1946 decision in *Colegrove v. Green*¹⁶⁴ involved a suit by Illinois citizens attacking the apportionment of congressional seats among various districts within the state. One of the complainants lived in a district containing more than 900,000 people; other districts contained as few as 112,000.¹⁶⁵ The complainant's vote, as Justice Black observed in his dissent, was "only one-ninth as effective . . . as the votes of other citizens."¹⁶⁶

Joined as usual by Justices Douglas and Murphy, Justice Black argued that "[s]uch discriminatory legislation . . . [was] exactly the kind that the equal protection clause was intended to prohibit."¹⁶⁷ As an original matter this conclusion seems questionable, since the framers' focus was on racial discrimination and they had expressly disclaimed any intention of affecting the right to vote.¹⁶⁸ By 1946 it was a little late to raise either objection.¹⁶⁹ Whether there might be justifications for the discrepancy, however, re-

161. 326 U.S. 310, 316 (1945).

162. See *Hughes I*, *supra* note 3, *passim*.

163. See Cheatham, *Stone on Conflict of Laws*, 45 COLUM. L. REV. 719, 729 (1945). In *International Shoe*, 326 U.S. at 322-26, Justice Black wrote a separate opinion agreeing that the court below had jurisdiction and protesting, as he did repeatedly in other contexts, that the Constitution gave the Court no warrant to determine whether a state's exercise of power was "reasonable" or in accord with "fair play and substantial justice." See *supra* text accompanying notes 106-08, 147-51 (discussing *Southern Pacific Co. v. Arizona*, 325 U.S. 76 (1945) and *Adamson v. California*, 332 U.S. 46 (1947)).

164. 328 U.S. 549 (1946).

165. See *id.* at 569 (Black, J., dissenting).

166. *Id.* (Black, J., dissenting).

167. *Id.* (Black, J., dissenting).

168. See D. CURRIE, *supra* note 6, at 342-51, 384 (discussing the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) and *Strauder v. West Virginia*, 100 U.S. 303 (1880)).

169. See *id.* at 390-92 (discussing the extension of equal protection to nonracial classifications); Taft, *supra* note 20, at 70-71 (discussing its application to voting in *Nixon v. Herndon*, 273 U.S. 536 (1927)).

mained to be seen.¹⁷⁰

Although the substantive issues raised by the complaint were extremely challenging, the majority did not reach them. Justice Frankfurter, joined by Justices Reed and Burton, concluded that the questions presented were "of a peculiarly political nature and therefore not meet for judicial determination."¹⁷¹ Rutledge, the only other Justice participating, concluded that the complaint had been properly dismissed "for want of equity."¹⁷² Hence, by a four-to-three vote, the judgment dismissing the complaint was affirmed.

Earlier decisions had occasionally suggested that certain "political" questions were indeed beyond judicial ken.¹⁷³ The whole course of constitutional decision, however, demonstrated that the mere fact that an issue was of political significance did not bring it within that category. Though some of the opinions were foggy, the Court seemed largely to have held that certain matters lay within the discretion of other governmental bodies¹⁷⁴ and that the section of article IV by which the United States guaranteed to each state a republican form of government, as its text suggested, gave the citizen no enforceable rights.¹⁷⁵

Justice Frankfurter's most concrete argument was that article I gave *Congress* authority to revise state regulations governing the time, place, and manner of congressional elections,¹⁷⁶ but explicit congressional authority to enforce the Civil War amendments¹⁷⁷ had never been held to oust courts of ordinary jurisdiction to determine the constitutionality of state action under them. Furthermore, since it was Congress that was allegedly malapportioned, there was a particularly hollow ring to Justice Frankfurter's conten-

170. Justice Black also invoked article I's requirement that members of the House be "chosen . . . by the People of the several States," U.S. CONST. art. I, § 2, cl. 1, which obviously required some interpretation before it could be said to outlaw the apportionment in question. See *Colegrove*, 328 U.S. at 570 (Black, J., dissenting).

171. *Colegrove*, 328 U.S. at 552.

172. *Id.* at 565 (Rutledge, J., concurring).

173. See D. CURRIE, *supra* note 6, at 67 & n.19, 252-57 (discussing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-71 (1803) and *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849)); Hughes I, *supra* note 3, at 554 n.223 (discussing *Coleman v. Miller*, 307 U.S. 433 (1939)).

174. E.g., *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 421 (1839) (President's authority to recognize foreign sovereignty), discussed in D. CURRIE, *supra* note 6, at 253 n.121; see also *Marbury*, 5 U.S. (1 Cranch) at 137. The foggiest decision of all, *Coleman*, 307 U.S. at 433, can be viewed as holding that the Constitution imposed no limit on the time for ratification of an amendment and did not forbid ratification after rejection, though the Court also spoke more vaguely about the lack of judicially manageable standards for decision. See *id.* at 453-55.

175. See U.S. CONST. art. IV, § 4; see also *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 143-51 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

176. *Colegrove*, 328 U.S. at 554 (citing U.S. CONST. art. I, § 4, cl. 1).

177. See U.S. CONST. amends. XIII-XV.

tion that "[t]he remedy for unfairness in districting" was "to invoke the ample powers of Congress."¹⁷⁸ In fact, *Colegrove* was a classic illustration of Chief Justice Stone's wisdom in suggesting a special need for judicial review to assure the proper functioning of "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."¹⁷⁹

Chief Justice Stone died suddenly in April 1946, shortly before *Colegrove* was decided. Someone must have known how he would have voted in the case, since it had been argued before his death. One likes to think he would have voted with Justice Black to determine the case on its merits, since it was he who had pointed out in *Carolene Products* that the integrity of the democratic process was the crucial assumption on which deference to the political branches rested.¹⁸⁰

Nothing in Justice Frankfurter's brief opinion seems sufficient to justify a refusal to determine the impact of the equal protection clause in such a context. He would make a much more elaborate effort to do so some sixteen years later in *Baker v. Carr*.¹⁸¹ For now let it suffice that, popular impressions to the contrary notwithstanding, Frankfurter lost on this issue in *Colegrove*. In providing the decisive vote for dismissal on the ground that it might be too late for the petitioners to obtain effective relief before the impending election, Justice Rutledge made clear that he thought precedent established that the questions raised were justiciable.¹⁸²

V. CONCLUSION

Stone's brief tenure as Chief Justice was a time of tall Justices—Stone himself, Black, Frankfurter, and Jackson, to name only the most illustrious. Seldom have so many gifted Justices graced the institution at the same time.

It was a time of great victories and of great disappointments. Great blows were struck for freedom in such inspiring opinions as *Duncan v. Kanahamoku*¹⁸³ and *Ex parte Endo*,¹⁸⁴ *Cramer v. United States*¹⁸⁵ and *Es-*

178. *Colegrove*, 328 U.S. at 556. Justice Frankfurter also suggested that voters might "secure State legislatures that will apportion properly," *id.*, but those legislatures were apportioned in the same way and therefore no more likely than Congress to give away the excessive power of their incumbents. *See id.* at 567 (Black, J., dissenting).

179. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

180. Justice Murphy's biographer reports that "only one Justice" (not Black, Murphy, or Rutledge) voted to intervene when *Colegrove* was first discussed in conference, and that Justice Black initially had the "assignment" of writing to deny justiciability. *See* J. HOWARD, *supra* note 46, at 484 & n.C.

181. 369 U.S. 186, 266-330 (1962) (Frankfurter, J., dissenting).

182. *Colegrove*, 328 U.S. at 564-65 (Rutledge, J., concurring).

183. 327 U.S. 304 (1946), *discussed in* Stone I, *supra* note 1, at 8-9.

184. 323 U.S. 283 (1944), *discussed in* Stone I, *supra* note 1, at 19-20.

185. 325 U.S. 1 (1945), *discussed in* Stone I, *supra* note 1, at 21-27.

tep v. *United States*,¹⁸⁶ *Martin v. City of Struthers*¹⁸⁷ and *West Virginia State Board of Education v. Barnette*,¹⁸⁸ and *Smith v. Allwright*¹⁸⁹ and *Marsh v. Alabama*.¹⁹⁰ Entire fields of law were modernized and clarified by the Chief Justice's fine opinions in *Southern Pacific Co. v. Arizona*¹⁹¹ and *International Shoe Co. v. Washington*.¹⁹² The Court did what it could to curb the excesses of war; but cases like *Ex parte Quirin*,¹⁹³ *In re Yamashita*,¹⁹⁴ *Hirabayashi v. United States*,¹⁹⁵ and *Korematsu v. United States*¹⁹⁶ were sobering reminders both of the limits of judicial review and of the responsibility of other branches for safeguarding fundamental liberties.¹⁹⁷ *Colegrove v. Green*¹⁹⁸ postponed for a generation the correction of the glaring anomaly of malapportionment, and *Betts v. Brady*¹⁹⁹ prevented for the same period fulfillment of the promise of fair trial the Court had made ten years before.

It was a time of vigorous disagreement among the Justices, most notably over the question of heightened scrutiny of measures affecting "specific" constitutional prohibitions, political processes, and insular minorities that Stone had raised in his perceptive footnote in *United States v. Carolene Products Co.*²⁰⁰ To a substantial extent Stone's view had already prevailed, though the battle was not to be fully won until Justice Frankfurter's retirement in 1962. As leading spokesmen for the two competing views, Justices Black and Frankfurter, like Justices Field and Miller three-quarters of a century before,²⁰¹ squared off in 1946 for another decade and a half of intense controversy over the most fundamental questions of judicial authority.

It was a time, finally, to celebrate the career of a truly extraordinary member of the Court. In his twenty years on the Bench, Harlan F. Stone had done more perhaps than any other Justice to bring constitutional law into the twentieth century.²⁰² We are indebted to him for one of the most effec-

186. 327 U.S. 114 (1946), discussed in Stone I, *supra* note 1, at 33-37.

187. 319 U.S. 141 (1943); see also *supra* notes 73-78 and accompanying text.

188. 319 U.S. 624 (1943); see also *supra* notes 81-92 and accompanying text.

189. 321 U.S. 649 (1944); see also *supra* notes 112-19 and accompanying text.

190. 326 U.S. 501 (1946); see also *supra* notes 125-33 and accompanying text.

191. 325 U.S. 761 (1945); see also *supra* notes 147-52 and accompanying text.

192. 326 U.S. 310 (1945); see also *supra* notes 161-63 and accompanying text.

193. 317 U.S. 1 (1942), discussed in Stone I, *supra* note 1, at 4-5.

194. 327 U.S. 1 (1946), discussed in Stone I, *supra* note 1, at 5-7.

195. 320 U.S. 81 (1943), discussed in Stone I, *supra* note 1, at 9-15.

196. 323 U.S. 214 (1944), discussed in Stone I, *supra* note 1, at 15-19.

197. See generally Stone I, *supra* note 1.

198. 328 U.S. 549 (1946); see also *supra* notes 164-82 and accompanying text.

199. 316 U.S. 455 (1942); see also *supra* notes 95-111 and accompanying text.

200. 304 U.S. 144, 152 n.4 (1938), discussed in Hughes I, *supra* note 3, at 546.

201. See D. CURRIE, *supra* note 6, at 537-58.

202. See A. MASON, *supra* note 144, at 777 ("In a logical, as well as a chronological, sense

tive protests against the old order,²⁰³ as well as the authoritative program of the new. He almost singlehandedly wrote the modern law of intergovernmental immunity, commerce clause preemption, full faith and credit, extra-territorial taxation, and personal jurisdiction.²⁰⁴ Next to Marshall and Holmes, Stone may well have been the most influential Justice yet to have presided on the Supreme Court.

Stone was the one who, in both the old and the new Court, carried the Holmes-Brandeis tradition to its fruition.”).

203. See *United States v. Butler*, 297 U.S. 1, 78-88 (1936), discussed in *Hughes* 1, *supra* note 3, at 530-36; see also Wechsler, *Stone and the Constitution*, 46 COLUM. L. REV. 764, 777 (1945) (“In the battle that followed [the *Butler* dissent] was the standard of attack.”).

204. See Cheatham, *supra* note 163, at 733 (“[S]ince Story wrote his great treatise over one hundred years ago no member of the court has contributed more than the late Chief Justice to conflict of laws.”); Magill, *Stone on Taxation*, 46 COLUM. L. REV. 747, 752, 763 (1945) (“Mr. Justice Stone’s operations in the field of state jurisdiction to tax intangibles . . . contributed much to the establishment of sensible rules. . . . He put intergovernmental tax relations on a sound basis.”).

